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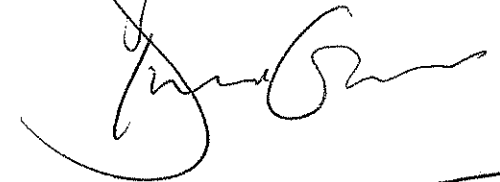
PECULIAR INSTITUTION

America's Death Penalty
in an Age of Abolition

DAVID GARLAND *Nov 2010*

for Frank Baumgartner,

*in admiration +
with good wishes*



THE BELKNAP PRESS OF HARVARD UNIVERSITY PRESS
Cambridge, Massachusetts

2010

dispositive. In many respects it was a classically American outcome. It focused on procedure not substance, and on individual cases not general policies. It purported to follow public opinion rather than to lead it. And it ultimately avoided resolution in favor of further rounds of negotiation and compromise. Far from a decisive abolition imposed by a self-confident elite, it was more like a tentative test balloon, floated by the Court to see how the political winds were blowing.⁸⁷

What had seemed at first to be a total abolition of capital punishment would turn out to be merely a condemnation of standardless sentencing in capital cases.⁸⁸ Death would require due process. Being "different," it might even require "super due process."⁸⁹ But it was not abolished. Rather than marking the end of capital punishment in America, *Furman* marked the beginning of the contemporary system that persists to this day.

■ N I N E ■

New Political and Cultural Meanings

I'm sick of crime everywhere. I'm sick of riots . . . I'm sick of the U.S. Supreme Court ruling for the good of a very small part rather than the whole of our society.

LETTER FROM A CONSTITUENT TO SENATOR SAM J. ERVIN, JR.,
OF NORTH CAROLINA, JUNE 1968

The immediate reactions to *Furman* were mixed. In the days following the decision, newspapers reported it as a human interest story, highlighting the reaction of the men and women whose death sentences had been overturned. Photographs of prisoners standing beside unplugged electric chairs accompanied reports announcing, "Fifty-five inmates awaiting execution at the Ohio Penitentiary heard radio reports on the decision and then 'broke out with cheers, shouts and yelling'"; and "At Florida's Raiford Prison 96 men and 1 woman on death row engaged in 'considerable shouting and hilarity.'" But if the prisoners' reaction was straightforward, the political response was more conflicted. The *Washington Post's* June 30 headline read: "Joy on Death Row; Praise, Scorn on Capital Hill."¹

Liberal voices greeted the decision as enthusiastically as we would expect. Senator Edward Kennedy acclaimed it as "one of the great judicial milestones in American history" and said that the Court had "ruled for life" and thereby "given new life to our democracy and to the quality of American justice." In the same vein, Pennsylvania Attorney General J. Shane Creamer described the decision as "a triumph of reason and law over fear and anxiety."² The Congressional Black Caucus described itself as "relieved" by a "ruling that is of particular interest and importance to Black Americans because of the high percentage of Black prisoners who have been sentenced to death."³

But critical voices also formed part of that first day's story, many of them from Southern politicians and law enforcement officials. Police chiefs in Atlanta and Memphis complained that *Furman* had deprived them of an important deterrent at a time when crime was rising. Los Angeles Police Chief Edward M. Davis told a press conference that the decision was an "absurdity" and promised to lead a nationwide campaign to restore capital punishment.⁴ Prison guards complained that the Court's decision took away "the only real protection we had."⁵ Tennessee Governor Winfield Dunn professed "tremendous shock and disappointment," a sentiment echoed by Lieutenant Governor Jere Beasley of Alabama, who commented that the Court had evidently "lost touch with the real world." James O. Eastland, Democratic senator from Mississippi, raised the flag of states' rights when he accused the Supreme Court of "legislating" and "destroying our system of government," while Georgia's lieutenant governor, Lester Maddox—a firebrand white supremacist—called the decision "a license for anarchy, rape, and murder."⁶

It was to be expected that conservatives would push back against the Court's decision, but no one at first knew how or how hard. Initially there was some confusion about the meaning of the decision. Was the death penalty now completely unconstitutional? Would its reintroduction require a constitutional amendment? Republican leaders quickly took steps to clarify where things stood and to chart a way forward. The day after *Furman* was announced, President Nixon declared at a press conference that "the holding of the Court must not be taken . . . to rule out capital punishment," and Governor Ronald Reagan urged California voters to support an initiative on the November ballot to reinstate the death penalty.⁷

Before long, support for the death penalty was being mobilized all across the country. On July 2 the *New York Times* carried an article entitled "Banned—But for How Long?" describing the *Furman* precedent as "very vulnerable" and quoting legal experts to that effect. The article reported that a constitutional amendment had already been introduced into Congress permitting the death penalty for murder and treason and that "legislators in at least five states" had announced they would press for new state laws reintroducing capital punishment.⁸ On July 6, only a week after *Furman*, Philadelphia District Attorney Arlen Specter was reported to have proposed a new bill to the Pennsylvania legislature that would provide the death penalty for eight different types of murder.⁹ Within a few months activists were campaigning for reinstatement in every state in the country, supported by police chiefs, state attorneys general, local district attorneys, and assorted politicians.¹⁰

What this amounted to was the mobilization of pro-death penalty

forces on a national scale for the first time in U.S. history. When the *Furman* case was argued in January 1972, dozens of *amicus* briefs had been attached to the LDF brief, but not a single organized group joined the states in defending capital punishment, not even the federal government. There had been no active, pro-death penalty lobby. Now a nationwide movement had been brought into existence. Instead of ending the death penalty, *Furman* had roused the nation's pro-death penalty forces and mobilized them as never before.

For 200 years, the activists in death penalty politics were chiefly anti-gallows abolitionists, challenging a settled, traditional practice and the embedded preference of a majority of Americans. Now the balance had changed. The Court's surprise decision and the accompanying publicity focused the issue of capital punishment and moved it up the political agenda.¹¹ Even before the decision was announced, public opinion was already moving in favor of capital punishment, and the new activism served to accelerate this shift.¹² Citizens expressed outrage at what they regarded as the Court's attack on their values. This in turn energized state legislators, who seized the opportunity to provide their constituents with the laws they demanded. In nullifying the death penalty statutes of so many states, the Court had created a gap between majority voter preferences and state law—a gap to which many politicians were immediately drawn. As Lee Epstein and Joseph Kobylka remark, in the summer of 1972, state legislatures "could barely wait to reconvene to pass new laws."¹³

Within two years, thirty-five states had enacted new capital statutes.¹⁴ Re-enactment was rapid everywhere but faster in states where murder rates had increased and fastest in the South. Florida was the first to enact a new law, successfully passing a new statute in December 1972.¹⁵ The month before, California voters had endorsed death penalty restoration, voting two to one for Governor Reagan's Proposition 17. In September 1973 Reagan signed the new act into law.

In every death penalty state the story was the same. Even Jimmy Carter, the liberal Democratic governor of Georgia, signed a new bill into law in 1973. Only Governor Michael Dukakis of Massachusetts stood against the tide, vetoing a capital punishment bill that the state legislature had approved—an abolitionist stance that would cost Dukakis dearly when he ran for president in 1988. Capital trials were soon under way across the country. By the end of 1974, despite serious doubts about their validity, new state statutes had been used to sentence some 231 people to death.¹⁶

So the death penalty re-emerged, with the enhanced support of public opinion and of newly mobilized activists. But the institution that resurfaced in the 1970s bore a new set of political and cultural meanings that

had been forged in the course of the battles fought in the lead-up to *Furman* and in its aftermath.

The LDF litigation of the 1960s swept the death penalty up into the civil rights movement, rendering abolition as an NAACP-sponsored civil rights reform. In the same way, the *Furman* majority embodied the spirit of the Warren Court in offering a liberal reading of the Constitution, intended to heal racial divisions and expand the reach of liberty and equality.¹⁷ The immediate effect was to alter the death penalty's connotations, associating it in the public's mind with civil rights, with liberal attitudes toward blacks, and with countermajoritarian federal reform. Then, in the process of reaction that followed *Furman*, the death penalty was inscribed into a very different politics—the politics of backlash—which gave the institution a whole new set of associations, linking it with “law and order,” with “states' rights,” and with what would later become known as “culture war” conservatism. These new associations clung to the death penalty for a generation, investing it with layers of meaning and depths of feeling that it had not previously had—both for conservatives who supported the institution and for liberals who opposed it. The death penalty as penal policy gave way to the death penalty as political and cultural symbol.

The Politics of Reaction

The reaction to *Furman* occurred within a definite context and had several distinct aspects. The LDF campaign that produced *Furman* was launched in 1963 at the height of the liberal ascendancy and the eve of President Johnson's Great Society project. By 1972 American liberalism had suffered a historic defeat and been displaced by a new conservative majority. In this new context, *Furman* was decried as an absurd, out-of-touch decision that undermined the fight against crime, infringed states' rights, and usurped the people's power. Each of these attacks was prefigured in the opinions of the four dissenting justices, all of whom had been appointed by President Nixon. And each of them sounded, in a minor key, the major themes of the political reaction against liberalism that Nixon and his Republican successors would undertake. Right from the start, the reaction against *Furman* was part of a wider backlash against civil rights, against Great Society liberalism, against the permissiveness and disorder of the 1960s, and against the elite-led, countermajoritarian power that liberals had wielded via the Court.

In the aftermath of *Furman* the American death penalty came to be narrated in three new frames, each of them retentionist in orientation, and

each of them linked to the new politics of conservatism that dominated the national scene. From the mid-1970s onward, capital punishment came increasingly to be viewed as a law and order issue that treated support for the death penalty as crucial to the new war on crime; as a states' rights issue that treated support for the death penalty as a necessary response to an overreaching federal government; and as a culture wars issue that treated support for capital punishment as an expressive means of affirming belief in traditional values, fundamentalist religion, and the Southern way of life. All three were part of the more general backlash against civil rights, the Great Society, the Warren Court, liberal governance, and the cultural changes of the 1960s. All three had a prominent place in the “Southern strategy” of the Republican party. And all three worked to sustain the death penalty and increase its symbolic importance in the political and cultural life of the nation.

“Haven't we done enough for the Negro?” By 1966 white constituents were asking this question repeatedly, according to Democratic Congressman Lee Hamilton of Indiana.¹⁸ Already in 1963 journalists had talked about a “backlash,” referring to the countercurrent of resentment that the civil rights movement was creating, not just among white Southerners but also among ethnic white workers in Northern cities.¹⁹ Reporting a survey about white backlash, the *New York Times* article that carried Congressman Hamilton's remarks noted that the politicians and commentators who had been surveyed all agreed on one point: “there seems to be growing white resentment to aspects of the civil rights movement, whether it be violence in the streets, the cry by militants of black power, or the question of open housing.”

Those surveyed also agreed that the political beneficiaries of this backlash would be Republicans, since Democrats were the incumbents responsible for passing the major civil rights acts, though in some areas, such as Georgia, “the Democratic candidate is even more anti-Negro than his segregationist Republican opponent.” The article went on to quote an anonymous White House source who described the backlash as “the number one issue,” especially in the conflicts over busing that were breaking out in places such as Boston, Buffalo, and Long Island. As Lee Hamilton put it, “for Democrats it's as dangerous as any issue in the election in terms of changing votes.”²⁰ In the language of the time, the civil rights revolution had been a “Negro revolution”: now it was generating a countermovement among the working-class whites whose power it had allegedly diminished.

The backlash prompted countless letters to editors and complaints to congressmen. A letter sent to Sam J. Ervin, Jr., Democratic senator of

North Carolina, in June 1968 by Curt Furr, a white Southerner and the father of five, powerfully expressed its popular sentiments:

I'm sick of crime everywhere. I'm sick of riots. I'm sick of "poor" people demonstrations (black, white, red, yellow, purple, green or any other color!) I'm sick of the U.S. Supreme Court ruling for the good of a very small part rather than the whole of our society . . . I'm sick of the lack of law enforcement . . . I'm sick of Vietnam . . . I'm sick of hippies, LSD, drugs, and all the promotion the news media give them . . . But most of all, I'm sick of constantly being kicked in the teeth for staying home, minding my own business, working steadily, paying my bills and taxes, raising my children to be decent citizens, managing my financial affairs so I will not become a ward of the City, County, or State and footing the bill for all the minuses mentioned herein.²¹

Progressive political change is normally followed by conservative reaction, and liberal reform achieved by court rulings may be especially susceptible to this backlash.²² But the events of the mid-1960s fomented a remarkably potent reaction—one that rapidly gained ascendancy and then dominated U.S. politics for the next thirty years. Within the context of this political and cultural backlash the American death penalty was reinvented by the Supreme Court and the state legislatures, acquiring a new set of forms and meanings in the process. To understand the death penalty's symbolism as it has come to operate over the last thirty years, we need to understand the politics of reaction.

The resistance of white Southerners to the civil rights movement was to be expected given the movement's assault on white supremacy and Jim Crow segregation. The reaction that was less predictable, and that transformed backlash from a regional to a national phenomenon, was the anger and resentment of working-class whites in Northern cities. Backlash politics had its roots in the demographic shifts of the Great Migration. The movement of large numbers of poor Southern blacks into Northern cities gave rise to ongoing conflicts with working-class whites over scarce resources, especially jobs, housing, and public schools. These tensions were manageable during postwar decades, when an expanding economy generated rising standards of living, but they became much more disruptive when adverse economic conditions set in and declines in entry-level industrial jobs devastated the lower sectors of the labor market in the urban North.²³

By the 1950s, local elections in Northern working-class neighborhoods were showing signs of "simmering white discontent" and "antiliberal political organization" as ethnic whites objected to integration and miscegenation.²⁴ A decade later widespread deindustrialization, together with increased inflation and higher taxes, was causing a noticeable decline in real

wages for working-class whites and an increase in opposition to civil rights legislation. Civil rights reforms in housing, schools, welfare, and political representation were widely viewed as a transfer of wealth, power, and status to blacks—a transfer ordained by well-to-do liberal Democrats but paid for by poorer and more conservative working-class whites.²⁵ The increased attention the media and government now paid to the problems of blacks made many working- and middle-class whites feel like a "forgotten majority." When urban crime rates began their dramatic rise (the murder rate doubled between 1963 and 1969 and overall crime rates increased by double digits nationwide) and the welfare rolls of large cities suddenly exploded—with blacks disproportionately involved in both developments—racial resentments were ready to spill over.²⁶

These background tensions were roiled by a chain of disruptive events that unfolded during the second half of the decade. Noisy political demonstrations involving violent clashes with police; violent riots in one ghetto after another; more than 100 cities experiencing widespread looting, multiple deaths, and damages in the millions of dollars; the assassinations of the political leaders Robert Kennedy and Martin Luther King, Jr.—each of these events was captured on camera and screened on the evening news for the whole nation to see:

On a hot August evening in 1965, days after Johnson had signed the Voting Rights Act into law, the Watts section of Los Angeles exploded in violence. Before the National Guard could restore order, 34 were dead, hundreds were injured, almost 4,000 were arrested, and roughly \$35 million in damage was done.²⁷

The "long hot summer" of 1967 saw riots in Newark, Detroit, and more than 100 other cities. In 1968, President Johnson ordered the U.S. army into position—tanks and all—after the burning and looting had come within two blocks of the White House. At the same time, the emergence of a more militant "black power" politics, the increased radicalism of the antiwar movement, and the cultural shock of feminists, hippies, and assorted countercultural forces all had a disturbing impact on the nation's psyche—not least on the lower-class whites who generally shunned radical politics but who were (after poor urban blacks) the chief victims of the violence and disruption that gripped their cities.²⁸

In these years—the same years that the LDF litigation was slowly winding through the federal courts—the civil rights movement changed, becoming more controversial and generating more resistance. As Thomas and Mary Edsall observe, the civil rights agenda "shifted away from an initial, pre-1964 focus on government guarantees of fundamental citizen-

ship rights for blacks" toward a new focus on a more radical set of goals "emphasizing equal outcomes . . . for blacks, often achieved through racial preferences." These new goals were vigorously opposed by conservatives and by the Republican party. The effect was to drive a wedge between the Democrats and their supporters, who were now identified with radical civil rights and the cause of African Americans, and Republicans, who became the party of opposition to the civil rights movement and the racial and social policies it entailed.²⁹ Among working-class whites, inflammatory issues such as busing, open housing, and affirmative action generated intense opposition, and Republicans soon positioned themselves to express this discontent, giving voice to the anger that many whites increasingly felt toward blacks and the liberal elites who were their chief allies.

The disruptive and racially charged upheavals of these years eventually produced a major realignment in American politics—a realignment defined by the collapse of liberalism, the resurgence of free-market economics and neoconservative social policy, the movement of white Southern voters from Democratic to Republican, and a decisive shift in race relations that brought a halt to the historic progress of black people and many of the policies that had facilitated it. This realignment, which would benefit the Republicans for more than a generation, was in large part the achievement of the party's "Southern strategy" and the racial and class divisions that it so successfully exploited. At the heart of this strategy was the popular appeal of "law and order," "states' rights," and "the social issue," together with all the unstated implications that these three slogans entailed.

The "Southern strategy"—first pursued by presidential candidate Barry Goldwater in 1964 and used to greatest effect by Richard Nixon in 1968 and 1972—fixed on the popular discontent generated in the wake of civil rights legislation. It developed these inchoate grievances and resentments into "wedge" issues that would define clear political divisions that worked to the Republican party's advantage. Running through all the strategy's issues was an increasingly hostile public perception of blacks and the claims being made on their behalf.

By the late 1960s, it was becoming apparent that there had been a marked shift in the dominant public perception of race issues. When it first got under way in the 1950s, the civil rights movement had presented an image of "the Negro" as an abused victim, a hard-working American who had been denied citizenship and subjected to violence and abuse but who was now patiently and lawfully struggling for justice. In the early 1960s, shocking televised images of white mobs and Southern sheriffs beating peaceful civil rights protesters, or unleashing dogs and water cannons on

them, moved public opinion and generated a great deal of sympathy for the cause. By the late 1960s much of this support had disappeared. The events of the interim years—above all the urban riots and looting, the rise of black street crime, and the increasingly militant stance of black leaders—worked to reduce public sympathy and alter the way many people looked at the issues. As the decade came to a close, the meaning of the civil rights struggle for many Americans had been transformed. Instead of Dr. King and Rosa Parks, the figures who now came to mind were Malcolm X and Stokely Carmichael. Instead of peaceful, put-upon protesters, the figure of the African American was now the black mugger or urban rioter. As James Sundquist writes, "The image of the Negro in 1966 was no longer that of the praying, long-suffering nonviolent victim of southern sheriffs; it was a defiant young hoodlum shouting 'black power' and hurling 'Molotov Cocktails' in an urban slum."³⁰

The association between civil rights and what conservatives decried as "violence in the streets" was always a tendentious one. But the worst riots had broken out immediately after the Voting Rights Act, forming an association in the public mind. Southern politicians such as George Wallace did their best to solidify the connection between rising crime and civil rights protest, depicting both as illegitimate challenges to law and traditional authority. Before long, the idea of "civil rights" was being used to attack the movement, with Richard Nixon repeating the refrain that "the first civil right of every American is to be free from . . . violence."³¹ Soon a racial divide opened up over law enforcement, with blacks seeing police brutality as the cause of the riots, and whites seeing the need for firmer enforcement.³²

An increasingly negative perception of blacks was reinforced by growing public concern about rising rates of crime and violence. Barry Goldwater picked up on this concern in 1964 when he talked about the need for "law and order" in a way that connected concrete fears of criminal victimization to more inchoate anxieties about shifting racial, class, and gender relations.³³ By 1968, more than 80 percent of Americans polled by the Gallup organization agreed with the statement, "Law and order has broken down in the country."³⁴ The same year, another poll showed "crime and lawlessness" ranking, for the first time since polls began, as the most important domestic problem in America.³⁵

This new public concern about crime was grounded in a real collective experience of increased risk and victimization, and it was perfectly respectable for politicians to respond to this unease. But these concerns, however well founded, tended to be heavily imbued with racialized fears and overlaid by anxieties about the changing place of blacks in American society.

Against this background, crime control and support for law enforcement came to be understood, at least by some, as the reassertion of white power. The conservative insistence on "law and order" took on these additional meanings and began to function as a well-understood code. To declare oneself against "violence in the streets" and in favor of "law and order"—as Goldwater, Nixon, and their successors would do—was to communicate about public safety but also about much more besides. Indeed, "Crime became a short-hand *signal*, to crucial numbers of white voters, of broader issues of social disorder, tapping powerful ideas about authority, status, morality, self-control and race."³⁶

The issue of race was rather closer to the surface in the second platform of the Southern strategy—the endorsement of "states' rights"—though it remained an unspoken implication rather than an explicit concern. The electoral prize that the Republicans so assiduously pursued was the Southern white vote. This had belonged to the Democrats ever since that party had brought about the end of Reconstruction and "redeemed" the region for its white population. Now, almost 100 years later, the Democrats' role in ending Jim Crow segregation had prompted millions of white voters to desert the party, destroying the "Solid South" and creating a floating voting bloc large enough to decide national elections.

The Republican leadership set out to secure the allegiance of that bloc, but they could hardly do so by disavowing civil rights or re-creating white supremacy. So rather than focus on substantive policies, the Republicans focused on constitutional interpretation. Echoing Strom Thurmond's claim that crime in the streets, communist agitation, and the breakdown of moral codes were all the fault of "the Supreme Court's assault on the Constitution" and a federal government that had "invaded the rights of the states," they took up a cause dear to the hearts of Southerners—that of "states' rights." Though it was 100 years before, many Southerners still felt the humiliation of defeat in the "War Between the States" and considered themselves victims of a cultural bigotry on the part of Northerners—a bigotry most recently expressed in the federal government's assault on racial practices that lay at the core of traditional Southern identity.³⁷ From Goldwater in 1964 to Reagan in 1980, "states' rights" was a Republican party slogan, signaling to the Southern states that under a Republican administration their "sovereignty" would be respected and they would be left to govern their own people in their own way.

The Republican embrace of states' rights could be represented to the nation as a principled belief that overreaching federal government was the problem and local control the solution. But to Southerners it said some-

thing more—namely, that President Nixon and a Republican Congress would seek to undo the gains of the civil rights movement and restore the "Southern way of life" with its racial inequalities and its religious commitments. And in this they were not mistaken. Several decades later, a top Republican adviser, Lee Atwater, explained to a researcher the political thinking behind the party's embrace of states' rights. "You start out in 1954 by saying, 'Nigger, nigger, nigger,'" said Atwater. "By 1968, you can't say 'nigger'—that hurts you. Backfires. So you say stuff like forced busing, states' rights, and all that stuff."³⁸ Atwater went on to say that even "cutting taxes" had racial appeal since "blacks get hurt worse than whites."³⁹ And the Republican tax revolt that began in these years, and was pressed further by Presidents Reagan and Bush, did indeed have a racially disparate impact, with blacks and Hispanics on the side of "tax recipients" and state beneficiaries and whites on the side of taxpayers, hostile to government programs. Being against tax increases and big government became, in some circles, a form of race politics.⁴⁰

Anxiety about the course of social change was another discontent targeted by the Southern strategy. Many of the cultural changes that occurred in the 1960s—the spread of more relaxed, permissive attitudes; the birth control pill and casual sex; recreational drugs; feminism and "women's liberation"; the shift from rigid moral codes to "situational ethics"—had long generated disquiet on the part of "middle America." As statistics emerged about increasing rates of family breakdown, divorce, out-of-wedlock births, and welfare claims, this disquiet grew and became a palpable source of political energy. At stake in these cultural upheavals was not so much a specific objection to this or that practice, but instead a more general white middle-class fear that a whole way of life was being eroded, that tradition, morality, and order were breaking down, that "America was coming apart at the seams."⁴¹

For an anxious, onlooking public, "Ghetto riots, campus riots, street crime, anti-Vietnam marches, poor people's marches, drugs, pornography, welfarism, rising taxes" were all signs of the same underlying problem—the "breakdown of family and social discipline" and the collapse of "respect for law."⁴² And though some of these cultural movements were led by white youths, college students, and professional women, the popular opposition that they engendered frequently took on a racial cast, focusing on the "urban black underclass" and its various "pathologies." As Dan Carter observes, it might be possible, in theory, to separate these issues from the question of race. But in reality, "fears of blackness and fears of disorder—interwoven by the subconscious connection many white Ameri-

cans made between blackness and criminality, blackness and poverty, blackness and cultural degradation—were the warp and woof of the new social agenda.”⁴³

Southern communities were especially disturbed by the new social and cultural developments. The Southern white male was the biggest loser in the upheavals of the 1960s—the Jim Crow regime was dismantled, white supremacy denied, and the traditional values of family, female domesticity, and religious observance came under threat. To rail openly against these civil rights, once they were established, was to invite charges of racism and sexism and bigotry. But to press the issues of family, faith, and country—or indeed to demand a return to law and order—was perfectly respectable and could be openly and vigorously pursued.

The Republicans’ Southern strategy embraced these discontents and offered slogans and policy proposals that appealed directly to them. Conservatives blamed liberals for the breakdown of law and order. They claimed that the civil rights movement had encouraged lawlessness and anarchy by popularizing civil disobedience. They accused the Supreme Court of undermining law enforcement by granting rights to suspects and being overly concerned about the civil rights of black murderers. They attacked the Great Society programs for rewarding urban rioters with undeserved benefits and with compassion instead of control.⁴⁴ From Nixon onward, the Republicans would become the party of law and order (and not of civil rights), the devotees of states’ rights (and not of big federal government), and believers in conservative social values (and not in the “permissiveness” and “relativism” they associated with 1960s liberalism). De-emphasizing civil rights; waging war on crime; ending the war on poverty; ending busing; opposing “activist” judges; stepping back from desegregation; lowering taxes; rolling back the welfare state—these were the new populist politics of the “silent majority.”

The “silent majority,” the “forgotten Americans,” people like North Carolinian Curt Furr with his five children and his list of “sick and tireds”—these were the people targeted by the Southern strategy. And these were the people on whose behalf Richard Nixon promised to govern in a 1968 speech that embraced these resentments and the political energy they supplied:

Forgotten Americans, those who did not indulge in violence, those who did not break the law, people who pay their taxes and go to work, people who send their children to school, who go to their churches, people who are not haters, people who love this country, and because they love this country are angry about what has happened to America.⁴⁵

In a speech the year before, George Wallace had made the same appeal, though his language was characteristically cruder and his racial allusions more explicit:

You people work hard, you save your money, you teach your children to respect the law. Then when someone goes out and burns down half a city and murders someone, pseudo-intellectuals explain it away by saying the killer didn’t get any watermelon to eat when he was ten years old . . . The Supreme Court is fixing it so you can’t do anything about people who set cities on fire.⁴⁶

To all of this, the Democratic party was slow to respond. Its perceived “pro-black” stance and its commitment to civil rights ensured it was continually on the defensive whenever some new riot occurred or some controversial Court decision was announced. And its refusal to take a hard line on street crime and antiwar protesters put it on the losing side of these issues. Worse, the standard liberal response—that the crime statistics were not to be believed, that the problem was police brutality or institutional racism, or that crime was really a matter for local government—suggested to working-class whites that Democrats did not sufficiently care about their issues.

The result was a historic shift in the electorate that altogether restructured American politics. After nearly 100 years of loyal Democratic support, white Southern voters moved, *en masse*, to the Republican party, where they would stay for the next thirty years. Fundamentalist religion became a potent force in public life with the rise of the Christian Right. And Republican majorities in Congress (and eventually on the Supreme Court) began to undo the progressive changes of the previous decade. The transformation began in the 1968 election. Nixon won the presidency by a narrow margin from Hubert Humphrey—who was attacked from the left by the anti-Vietnam war movement and from the right by law and order enthusiasts—though the House and Senate remained under Democratic control. Nixon’s narrow victory represented a historic defeat for liberalism, for no fewer than twelve million voters who had previously voted for President Johnson now either abstained or defected to Nixon or Wallace.⁴⁷ By 1972, Nixon and the Republicans were able to win in a landslide. In 1964, Lyndon B. Johnson had won 61.05 percent of the popular vote. In 1972, Richard Nixon won 60.67 percent. In eight years, the balance of power in the American nation had shifted decisively from liberal to conservative.

It would remain that way for more than thirty years, with a political

landscape dominated by law and order politics, a “new federalism” that gave more power to the states, and the back and forth of the culture wars. Fully twenty years after Nixon’s first presidential victory, Republican candidate George H. W. Bush ran a presidential campaign that accessed the same “submerged cluster of anxieties” and sounded all the same coded appeals to race and class division.⁴⁸ Only by this time, the death penalty had taken its place in the front and center of the campaign.

The Reinvention of Capital Punishment

In this postliberal, post-civil rights, law and order America the death penalty would be remade. Having been almost abolished in the liberal 1960s, it would be revived and reinvented in the more conservative decades that followed. The late-modern mode of capital punishment that emerged, jointly forged by the Supreme Court and the states, became a kind of masthead symbol for a new culture of control with its harsh sentencing laws, its mass imprisonment, and its risk-averse retributivism. The LDF litigation had represented the death penalty as a civil rights violation, a kind of legal lynching that ought to be abolished along with segregation and Southern racism. Now it became a populist crime-fighting measure, an emblem of states’ rights democracy and a symbolic battleground in the emerging culture wars. In the process, death penalty discourse became infused with powerful currents of race and class resentment and with white fears of black violence.

From the late 1970s, the question of capital punishment functioned as a litmus test for law and order commitment in the same way that “abortion” tests for conservative commitment. To ascertain if a judicial nominee or an aspiring politician was sound on law and order, one asked if he or she supported the death penalty. If the answer was negative or even hesitant, his or her credentials were thereby shown to be suspect. The scene was played out on national television time and time again—most memorably when Michael Dukakis failed the test in 1988, a dramatic defining moment that marked the beginning of the end of his presidential campaign. But though this litmus test is familiar and taken for granted, it is actually quite peculiar.

The death penalty has always been a harsh punishment and a tool of law enforcement. And in its modern penal mode its function was to deter serious offenders and eliminate those who would not be deterred. But in post-1970s America it became not so much a policy or a penal sanction as a commitment, a symbolic badge that declared the wearer’s position on “law

and order” issues—and on much else besides. The paradox here is that, by the 1970s, the death penalty’s deterrent effects had been shown to be uncertain at best, and the sanction had ceased to be used in a way that might make it an effective crime-fighting tool.

The idea of the death penalty as a key weapon in the war on crime became persuasive because conservatives chose to ignore doubts about its efficacy and endorse instead the popular attitude that favored the death penalty, either as a commonsense deterrent or as a harsh retributive response to hated criminals.⁴⁹ They did so, not because they were persuaded of capital punishment’s penological efficacy, but because they were certain of its political benefits. Once they had made that political judgment, it became a shibboleth of the conservative movement that the equation between the death penalty and effective crime control be regarded as unquestionable.

These claims were helped by the fact that crime had been rising rapidly since 1963, and conservative figures made a point of blaming rising homicide rates on the death penalty moratorium that had been in place over the same years (though murder rates increased in death penalty and abolitionist states alike). As John Little McClellan, the Democratic senator from Arkansas, put it when he introduced death penalty bill S1401: “The last execution in this country took place in 1967 . . . In the five years between 1967 and 1971, the number of murders in this country rose 61%. . . . Can anyone argue that this was a mere coincidence?”⁵⁰ Southern newspapers made the same connection. The *Atlanta Constitution* carried articles tracing the supposedly negative impact of the suspension of executions: “Crimes punishable by death in the electric chair have increased 235 per cent in Atlanta since the chair was last used in 1964, a survey of police records showed.”⁵¹ “We are threatened people. And it is either them or us,” the same newspaper said in a 1973 editorial entitled “Liberals and Crime.”⁵²

The conservative message went this way: the liberal elites and radical civil rights activists who had done so much to undermine the nation’s social order, its traditional values, and its Southern way of life had also tried to abolish the death penalty. This message was a powerful one all across the nation but it resonated especially in the South, where Republicans were now focusing their electoral efforts. In that context, abolition of the death penalty was civil rights for black murderers. *Furman* was the work of an “activist” federal judiciary operating in concert with Northern liberal elites who disdained the Southern way of life. As Lester Maddox had declared, the decision “was a license for anarchy, rape and murder.” Women were left unprotected in their homes. Order was undermined and

in danger of collapse. To a conservative white Southerner's way of thinking, the echoes of the hated Reconstruction were unmistakable. To demand the reintroduction of capital punishment was to do more than take a position in penal policy: it was to reassert the old order and oppose the changes wrought by liberal elites.

Republicans grasped that questions about capital punishment tended to put liberals on the wrong side of the "law and order" issue. If support for law and order was seen to require support for the death penalty—as Republicans now insisted—and the liberal establishment continued to oppose capital punishment (as it did for a decade and more), then Republicans won and liberals lost. However concerned Democrats might actually feel about crime, however tough their stance on sentencing or policing or crime-prevention might be, their opposition to capital punishment marked them as definitively soft on crime and out of touch with popular feeling. And in the 1970s, popular feeling was increasingly getting behind capital punishment. By November 1972, five months after *Furman* was announced, the *New York Times* reported that a Gallup poll had found a sharp rise in the numbers supporting a death penalty. As the *Times* article noted, "Despite the United States Supreme Court's ruling striking down the death penalty, public support for capital punishment is currently at its highest point in nearly two decades."⁵³

Marked by fear of crime, racial hostility, and a growing gap between liberal elite sentiment and mass popular opinion, the death penalty came to function as the epitome of an *expressive* punishment. Loud demands for the death penalty were a kind of acting out, a means of communicating rage and resentment as well as hatred of the criminal other. The sanction's powerful capacity to convey emotion overwhelmed all doubts about its ability actually to deter murderers. In the cut and thrust of electoral politics and rhetorical debate—especially in the sound-bite age of TV journalism—the death penalty was the perfect leading edge for a harsher law and order politics.

It was these circumstances, together with the rhetorical work of conservative commentators and party operatives, that transformed the American death penalty into a powerful condensation metaphor, a synecdoche that enabled a single position to stand for a whole law and order attitude.⁵⁴ Despite the death penalty's tenuous link to real crime control, despite its narrow application and the rarity of its use, despite the utter implausibility of the idea, capital punishment became the "solution" to crime that dominated political debate. To voice unquestioning support for the death penalty was to communicate that one was for law and order. To raise doubts about its efficacy or morality was to lose credibility and popular support.

A functioning litmus test had been devised, however unscientific its underlying chemistry, and it worked time after time for the conservative cause.

The death penalty operated as a wedge issue benefiting Republicans for twenty years, from the early 1970s until the early 1990s. Presidents Nixon, Reagan, and George H. W. Bush would each use it to win popular support and to disparage liberal opponents—most notably in the 1988 Willie Horton campaign and the trouncing of Michael Dukakis.⁵⁵ As late as 1995, the Republican House majority leader, Newt Gingrich, was pushing a platform of tax reductions and death penalty increases, and proposing mass executions ("27 or 30 or 35 people at one time") as a solution to the drug problem.⁵⁶ It was not until Bill Clinton embraced capital punishment and made it part of mainstream Democratic politics that the issue ceased to divide the parties.⁵⁷ In the mid-1990s congressional representatives of both parties competed to see who could introduce more new capital statutes—by 1996, Democrats were claiming credit for enacting no fewer than sixty new federal capital offenses. Historians might see, in this spree of legislative *Thanatos*, an echo of the eighteenth-century process that produced England's Bloody Code. In both cases, lawmakers enacted penalties of death to further their political interests and those of their constituents—private property in eighteenth-century England, social values and racial hierarchies in twentieth-century America. In both cases, the practical result was a death penalty reinvigorated and reasserted—though more often on the books than on the scaffold.

The call by Southern politicians for a return to the gallows often contained distinct echoes of lynching. In its insistence on the punishment of death and the suppression of black civil rights, the Southern backlash against *Furman* echoed the backlash against Reconstruction and the lynching scenes that it created. On occasion it even produced explicit invocations of lynching imagery. Here, for example, is Georgia's lieutenant governor, Lester Maddox, invoking the lynching past when he enthuses about "the noose" and "court house square" hangings, even though Georgia was an electrocution state that had long since abolished hangings and public executions: "There should be more hangings. Put some more electricity in the chair. Put more nooses on the gallows. We've got to make it safe on the street again . . . It wouldn't be too bad to hang some on the court house square, and let those who would plunder and destroy see."⁵⁸

Maddox's evocation of public hangings outside the court house was not the only allusion to lynching voiced in these debates. Another Georgia legislator, State Representative Guy Hill of Atlanta, proposed a bill in the Georgia House Judiciary Committee that required hanging to take place "at or near the courthouse in the county in which the crime was commit-

ted.”⁵⁹ The same debate included a remark from another death penalty enthusiast, Representative James H. (Sloppy) Floyd: “If people commit these crimes, they ought to burn.”⁶⁰ No doubt Sloppy Floyd would insist, if asked, that he was referring to death in the electric chair. But the brutal language of “burning” offenders also evokes the worst kind of lynchings where black suspects were tortured and burned at the stake.⁶¹ African Americans understood these coded messages. They, too, viewed the death penalty through a prism of race and saw that blacks were its chief targets. Little wonder, then, that black groups and black politicians were the main opponents of the new legislation as it swept through Southern state legislatures.⁶²

States' Rights and Culture Wars

The *Furman* decision provoked bitter complaints about activist judges and overreaching federal government meddling in matters that fell within the autonomous scope of state authority. Herman E. Talmadge, the Democratic senator (and former governor) of Georgia greeted the decision by declaring, “Five of the nine members of the U.S. Supreme Court have once again amended by *judicial usurpation* the Constitution.” His fellow Georgian, State Representative Sam Nunn, echoed Talmadge’s sentiments by referring to a “dictatorship” of judges appointed for life. The chairman of the Senate Judiciary Committee, James O. Eastland, Democratic senator from Mississippi, accused the Court of “legislating” and, in doing so, “destroying our system of government.” Robert List, the attorney general of Nevada, denounced the decision as “an insult to Nevada, to its laws, and to its people.”⁶³ As the father of a murder victim said to the *Chicago Tribune*, “I guess it means nothing that the people of Illinois voted to keep the death penalty.”⁶⁴ If elite-led countermajoritarian reform had been effective in ending the death penalty in Europe, in America it provoked only outrage and opposition.

Ironically—and by way of this outraged reaction—it was *Furman* that effectively forged the association between the death penalty and democracy that still prevails in America today. By denying “the people”—or at least the people of Georgia, Texas, and the other death penalty states—the punishment that they “willed,” the *Furman* Court made capital punishment a symbol of that “will” and a token of popular democracy. Arguments for the death penalty, thereafter, became arguments for democracy.

Furman’s invalidation of capital punishment was read in the South as an illegitimate attack on the region’s cultural traditions by outside elites.

(As one poster outside an execution responded, “Texas Justice: Don’t Like It? Leave!”⁶⁵) It was seen as a continuation of the same assault on the Southern way of life—mounted by the Supreme Court and by Northern liberals—that had first dismantled segregation and racial hierarchies and more recently invalidated laws banning abortion. As on previous such occasions, the *Furman* decision unleashed a flood of popular resentment against the Court, its “activist judges,” and the Northern liberal elites who supported them. But whereas the earlier fights against *Brown v Board of Education* had necessarily been openly racist in their commitments, and hence lacked support in the rest of the nation, the South’s fight to retain capital punishment could be framed as a straightforward “law and order” issue that could generate support elsewhere with no thought of race. *Furman* thus gave the states, above all the Southern states, a means to assert their autonomy and push back against civil rights reform on an issue that was popular, respectable, and could be argued on grounds that were neither racial nor sectional. That the Southern states had very high homicide rates and a public that keenly supported capital punishment gave real force to this campaign, allowing local politicians to insist that Washington elites simply didn’t understand “the way things are down here.”⁶⁶

Today, nearly forty years later, the claim of “states’ rights” continues to resonate as a basis for opposing the Supreme Court’s death penalty reforms. In 2005, when the Court ruled in *Roper v Simmons* that states may not execute offenders who were minors at the time of their offense, the decision provoked another furor. But it was not the substance of the decision that was attacked in the dozens of outraged editorials and *op eds* that followed. No one argued that executing minors makes for good policy or a higher standard of decency. That, its detractors said, wasn’t the issue. The trouble with *Roper* was that in imposing its ruling the Supreme Court had usurped the power of the states and infringed their sovereign autonomy. The question was not, “what policy?” but, “who decides?”⁶⁷ A CNN commentator raged that “the majority’s approach [is] anti-democratic, anti-states’ rights, and anti-jury . . . A power that once belonged to state legislatures and local juries, now rests in the hands of the U.S. Supreme Court.”⁶⁸ The decision “reeks of judicial arrogance,” said the *Greenville News*, and showed what the *Omaha World Herald* called “an unhealthy disregard for the sovereignty of [our] homeland.”⁶⁹ The following year a state judge in Alabama ran his election campaign on a platform of rejecting *Roper* and defying the Supreme Court on the grounds of states’ rights.⁷⁰

The same outpouring of states’ rights outrage greeted *Kennedy v Louisiana* in June 2008, when the Supreme Court invalidated the capital child rape statutes of Louisiana and five other states.⁷¹ As the *Chattanooga*

Times insisted to its readers, "The basic issue is not whether there should or should not be a death penalty law for child rapists. The basic question is who should decide."⁷² A Texas prosecutor, Robert Etinger, accused the Court of seeking to "overthrow the will of the people."⁷³ Even Democratic presidential candidate Barack Obama was moved to take issue with the *Kennedy* Court, declaring that when it comes to the crime of child rape, "states have the right to consider for capital punishment."⁷⁴ The conservative culture warrior and one-time Nixon speechwriter Pat Buchanan responded to the decision by insisting that its chief author, Justice Stevens, "should be impeached." In his opinion Stevens had suggested that it was time to reconsider the "justification of the death penalty itself"—a remark that had Buchanan fulminating about democracy, states' rights, and the culture wars. "Stevens is not, or should not be, the decider," Buchanan wrote in his syndicated column. "In a democratic republic, that is the prerogative of the majority . . . It is just such usurpations of power by the Supreme Court justices that loosed the culture war that has torn us apart."⁷⁵

When capital punishment was abolished in other Western nations, death penalty supporters often put up fierce opposition. But none of the reports of these struggles suggests that specific groups or regions felt that in being denied the use of capital punishment they had been deprived of their heritage, that their way of life, their ethnic identity had somehow been degraded. People objected strongly to abolition, but they did not regard it as a status slight. In America, following *Furman*, many Southerners did.

If Southern legislatures had proposed banning capital punishment, as the legislatures of a dozen non-Southern states had done before 1972, those objecting to abolition would have marshaled many arguments for rejecting the proposal. But it is unlikely that they would have claimed that the death penalty was an essential part of a Southern heritage that ought to be retained on that basis. The reason that many Southerners saw the *Furman* decision as an attack on their culture had less to do with the institution's cultural belonging and more to do with perceptions of the process that brought *Furman* about.

Furman "abolished" the states' death penalty, temporarily at least, at the prompting of the same NAACP civil rights litigators, in the same federal Court, in the same countermajoritarian fashion that segregation in schools had been abolished in 1954. (Southerners and others would later see school prayer, antiabortion laws, and antisodomy laws struck down in the same way, and have much the same reaction.) The LDF litigators—who specially targeted the capital punishment practices of the Southern states—viewed death penalty abolition as the abolition of modern-day lynching and an extension of the same civil rights movement that had

abolished racial segregation, black disfranchisement, and Jim Crow. This attack on capital punishment more than anything else forged the institution's identity as part of "Southern culture." In the course of the litigation against capital punishment many white Southerners saw their culture and institutions being attacked by familiar enemies, and they determined to defend them accordingly. The death penalty was more Southern after *Furman* than it had been before.

Although the "culture wars" description did not become standard journalistic parlance until the 1990s, the underlying conflict between affluent, secular, liberal elites—located on the two coasts and especially in the Northeast—and religious, traditional conservatives, centered in the South and the Midwest, began much earlier, having been brought into focus by the Southern strategy and its emphasis on traditional, populist values.⁷⁶ Sparked into action by issues such as abortion, school prayer, flag burning, gun control, women's liberation, gay rights, and same-sex marriage, the "religious right" emerged as a potent political force in the 1980s and 1990s, using its influence to promote "faith, family, and country" and push back against what it saw as "permissiveness" and "secular progressivism" in public life.

The emergence of these cultural and religious divisions polarized death penalty debates still further. Support for capital punishment came to be seen as an integral part of the "traditionalist" worldview, just as opposition to it became standard for liberal "progressives." Depriving people of the right to impose capital punishment—like depriving them of their guns, or their right to school prayer, or their right to ban abortion—came to be viewed as a kind of elite contempt for common people, for their faith, and for their way of life. Alabama judge Tom Parker captured this sentiment when he protested that the Supreme Court's decision in *Roper v Simmons* had "usurped" Alabama's power to impose the death penalty on juveniles if it so chose. He noted that "the liberals on the U.S. Supreme Court already look down on the pro-family policies, Southern heritage, evangelical Christianity and other blessings of our great state. We Alabamians will never be able to sufficiently appease such establishment liberals, so we should stop trying and instead stand up for what we believe without apology."⁷⁷ Among groups primed by their class, their beliefs, or their regional identities to feel such slights, this contempt generated bitter opposition.

Christian fundamentalists and conservative evangelicals have a strong presence in the Southwest and the Midwest, too, but the culture wars mentality found its greatest resonance in the South. Why should this be? "Much of the dynamic in America's current culture war," one author suggests, comes from the fact that American liberalism destroyed "the culture

of official racism in the South."⁷⁸ Not only did the South contain large numbers of religious and social conservatives but from Reconstruction on many white Southerners developed a sense of victimization, feeling themselves disdained by Northern liberal elites and discriminated against by a federal government intent on undermining the Southern way of life and destroying its cultural heritage.

The abolition of capital punishment did, of course, raise genuine questions of religious faith. And Christian leaders were among the political and cultural figures to whom the press turned for comment when *Furman* was first announced. On June 30, 1972, the *Los Angeles Times* quoted fundamentalist preacher Dr. Carl McIntire as saying, "The Supreme Court is taking the country further away from the moral law and the teachings of God."⁷⁹

A week later, the letters column of the same paper carried five submissions about the Court's decision.⁸⁰ One said that it was characteristic of the four Nixon-appointed justices that they had all voted for the death penalty. Another remarked that the majority justices lacked wisdom. But each of the three others raised religious, "culture war" issues which, until that point, had been relatively absent from *Furman* debate. A letter from a reader in Long Beach objected that the death penalty was being abolished while abortion was still being permitted: "it staggers the imagination," the letter said, "that a vicious murderer will be spared while totally innocent potential human beings are being flushed into eternity via abortions." Keith Kearn of Los Angeles complained, "Without the death penalty we are changing our society from Christian to atheist," a sentiment echoed by Robert McConnell, who wrote, "The death penalty may no longer be man's law but it still is God's law . . . Let's get capital punishment into our Constitution."

So conservative religious objections emerged again, just as they had whenever abolition had been debated in the nineteenth century. But in the context of post-1970s America, the language of "tradition" and "faith"—like "law and order" and "states' rights"—could also be used to express racial and cultural attitudes that had become otherwise unsayable in respectable public settings. In these conflicts over culture, fundamentalist religion came to function less as a political theology than as a vehicle for lower-class resentments and the defense of traditional ways of life. In its insistence on literal readings of biblical texts and fundamentalist commitments unleavened by modernity and liberal tolerance, this old-time religion served as an affirmation of the worth of white Southern lower-class groups in the face of perceived condescension from secular progressives and liberal elites.

The biblical texts are ambivalent on the death penalty, and the various Christian churches are similarly divided on the issue. But cultural attitudes and a chain of historical events have made capital punishment a salient issue for religious conservatives. That the death penalty is seen as "traditional" rather than "modern," that it is viewed as an integral part of a valued way of life in which masculine honor codes, revenge, and Old Testament values remain strong—are part of the motivation. So is stern dislike of those who have offended against the laws of God and of man—righteous moralizing being a familiar trait of fundamentalists. To put a murderer to death—or merely to insist on the right to do so—is thus to uphold morality and deny solidarity in the most dramatic, profound way. The culture wars made it possible to express support for capital punishment in a way that conveyed a surface moral righteousness and a subterranean social animosity.

TODAY'S death penalty is deeply embedded in American political culture and casts a long shadow. The dramatic clash between federal courts and state legislatures—and, beyond that, the conflict between elite Northern liberalism and Southern popular conservatism—reshaped the meaning of American capital punishment and repositioned the issue in a new political and cultural context. *Furman's* unintended effect was to mobilize a pro-death penalty backlash, give new salience to the issue of capital punishment, and transform its political connotations. After 1972, the death penalty ceased to be a matter of penal policy and became instead a symbolic battlefield—first in the "law and order" backlash against civil rights and later in the culture wars, functioning alongside issues like abortion, welfare rights, defendants' rights, and affirmative action as a litmus test of political affiliation and cultural belonging. Support for the death penalty became a marker of respect for states' rights and traditional authority; a respectable (that is to say, not openly racist) means of asserting that the civil rights movement had gone too far; and a vehicle for Southern resentment about interference by Northern liberals. It came to mean opposition to "moral decay," to the decline of personal responsibility, and to the erosion of traditional authority that was widely believed to be the social legacy of the 1960s.⁸¹ Above all, support for the death penalty came to be a short-hand for a political position that was "tough on crime" and assumed to be in tune with popular attitudes.

After *Furman*, the death penalty became more than ever a Southern issue, first symbolically and then practically. After 1972, Northern states such as New York, Pennsylvania, and Ohio would no longer be among the leading executioners. Instead, the nation's executions would come to be

concentrated in the South of the old Confederacy and Jim Crow. In the four decades since executions resumed in 1977, the Southern states have accounted for more than 80 percent of all executions.⁸²

The reaction against *Furman* and America's subsequent shift to a "culture of control"—with its retributive revolution in sentencing law, the buildup of mass imprisonment, and the new politics of law and order—emerged out of the same political conflicts.⁸³ Indeed, the shift away from the progressive penal policy of the 1960s to the law and order politics of the 1990s began precisely at that moment, with the increase in prison population beginning in 1975 and continuing each year for more than thirty years thereafter. As retributivism and incapacitation displaced correctionalism as the core aims of penal policy, the death penalty ceased to stand in contradiction to general penal policy and became its symbolic leading edge. By politicizing the issue at a moment of rising anxiety about crime and disorder, and by mobilizing a wave of pro-death penalty activism, the *Furman* decision marked a watershed in public opinion trend lines. The steady erosion of public support for the institution that had been recorded throughout the 1950s and 1960s was reversed overnight, and majority opposition of the mid-1960s was transformed into majority support. This new pattern would continue for decades thereafter, peaking in the high-crime decade of the 1990s, when as many as 80 percent of Americans sometimes professed support for capital punishment.⁸⁴

The decline of American liberalism in the late 1960s and 1970s is the fundamental cause of the failure of American "final-stage" abolition. That much is clear. It is also clear that the *Furman* episode was critical in transforming the political and cultural meaning of the American death penalty. The institution's new meanings were contingent—the product of a specific sequence of events, in a specific historical context. They were created by groups of actors who employed specific political rhetorics and strategies to forge semantic associations that resonated with parts of the public and eventually became embedded in the culture. But though they were contingent and event-driven, these new meanings also bear the marks of America's institutional structure. To that extent, they were overdetermined rather than chance outcomes. For this reason an analysis of America's institutions and social structures is vital to any explanation of America's peculiar institution.

These shifts in the death penalty's meaning were an emergent outcome of interaction sequences, not a fully controlled, deliberate recoding. That is how the political process works. Contingent, historical events, specific to a time and place, give rise to a sequence of actions and reactions. In that process, contingency counts, context counts, history counts. No one fully

controlled what happened—not the LDF litigants, nor the Supreme Court justices, nor the right-wing commentators, nor the onlooking audience. The death penalty's meaning escaped the grasp of all who sought to control it. Instead, the underlying conflicts and fault lines of American society structured patterns of action and helped shape the eventual outcomes. The death penalty's new meanings were grounded in the raw materials of pre-existing conflicts and shaped by the structuring presence of an institutional landscape.